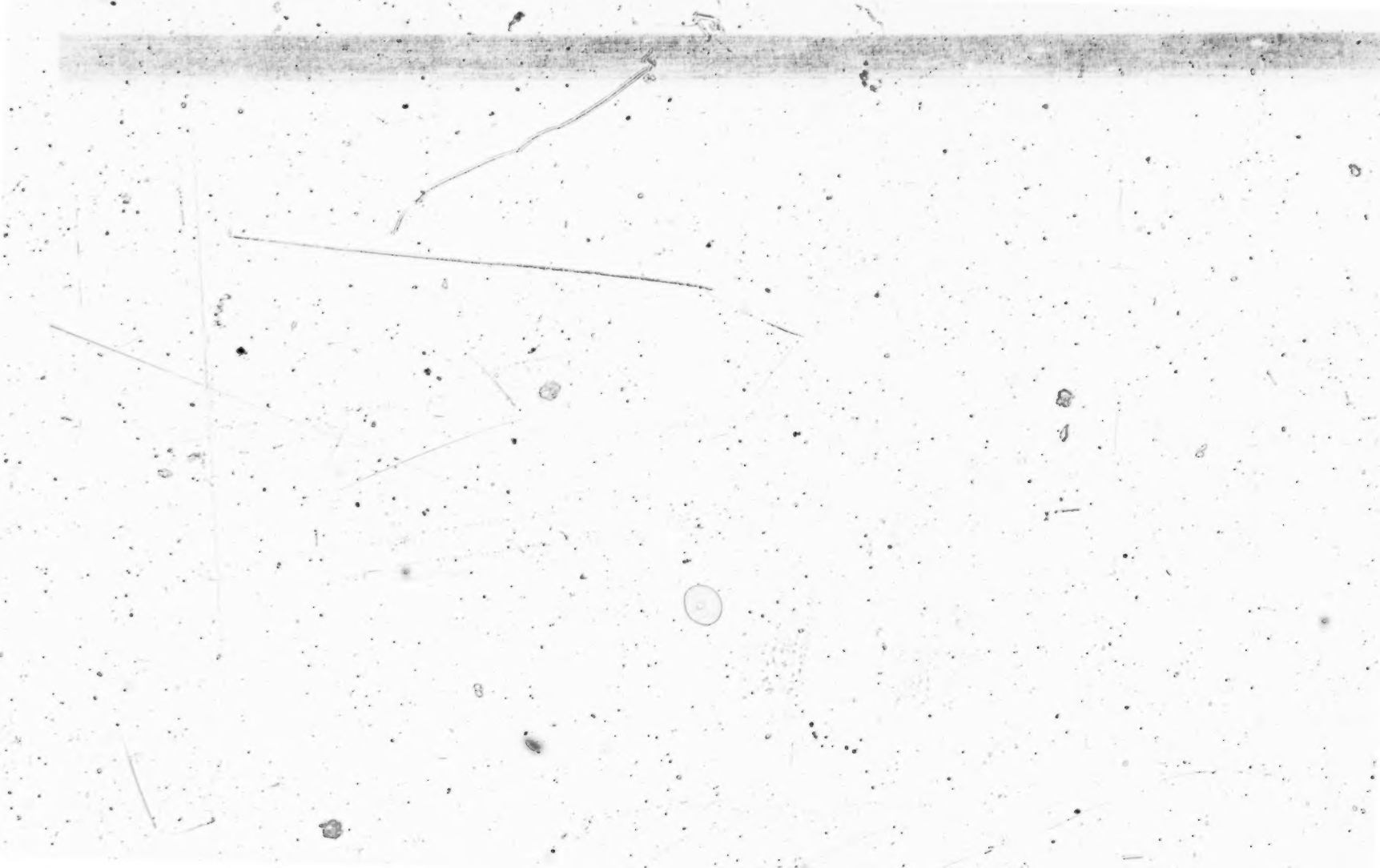

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In the

Supreme Court of the United States

October Term 1962

No. 648

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vs.

TRICON, INC., a corporation, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

MARTIN P. DETELS, JR.
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BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

Respondent believes the statute which sustains the jurisdiction of this Court is 28 USC Section 1257(3), not Section 1257(2) as urged by petitioner (Br. 2). Respondent also feels obligated to point out that the judgment of the Washington Supreme Court was entered September 17, 1962 as disclosed by its remittitur (R. 12a) rather than August 16, 1962 as stated by petitioner (Br. 2). See Revised Code of Washington 2.04.160 and 2.04.170 and Rule 15 of Rules Peculiar to the Business of the Washington Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

Petitioner asserts (Br. 2) that the validity of Sections 84.36.005 and 84.40.220, Revised Code of Washington are involved. This is not correct. The validity of

those sections of the Washington Code or of any other specific sections of the Washington Code was never raised by either party in the proceedings below, nor did either court below pass on the validity of those statutes. There is nothing in the record indicating that petitioner's assessor made the tax assessments here involved under the mentioned statutes, or that petitioner's treasurer levied the taxes in question under those particular statutes. The particular sections of the Revised Code of Washington alluded to by petitioner were in fact no more in dispute than were all the general property tax statutes of the State of Washington.

Respondent's complaint against the petitioner, so far as is material here, was simply that petitioner's collection of the general personal property tax from respondent with respect to the property involved "violates and is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States" (Complaint 3; R. 8).

Article I, Section 10, Clause 2 (the Import-Export Clause) of the Constitution of the United States in part provides:

> "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, . . ."

QUESTIONS PRESENTED

The single question presented is whether Article I, Section 10, Clause 2 of the United States Constitution prohibits a state from imposing a general ad valorem property tax upon goods which have been imported from foreign countries by the importer exclus-

ively for the purpose of sale to purchasers in the taxing state and other states while such goods remain unsold in their original packages in which they were carried into this country and while they are temporarily stored awaiting shipment via common carrier to the importer's vendees.

Respondent is dissatisfied with petitioner's statement of the questions (Br. 3-4). As pointed out above, no specific sections of the Washington Code were claimed to be violative of the Import-Export Clause, but, rather, the tax as imposed upon respondent's goods was claimed to violate that provision of the federal constitution.

Furthermore, there is no question as to goods "irrevocably dedicated to general sale" (Br. 3). That phrase has no place in this case, as there is nothing in the record to support this gratuitous characterization of respondent's goods. The goods simply were imported exclusively for the purpose of sale and were taxed while they were "owned and held for sale by (respondent) and temporarily stored in the original packages in which they were received from the ocean carriers awaiting sale and shipment to (respondent's) vendees, . . ." (Judgment 2; R. 3).

Petitioner's third paragraph under "Questions Presented" (Br. 4) raises a question of whether or not the Import-Export Clause applies only to excise taxes. This question was raised for the first time upon oral argument to the Washington Supreme Court. The question consequently was not timely raised below and cannot, therefore, be considered by this court on the petition for Writ of Certiorari. The question was not presented in

briefs of either party to the trial court or to the Washington Supreme Court. That court has followed a long standing rule of practice that questions not raised in any manner before the trial court will not be considered by it on appeal. *Johnson v. Seattle*, 50 Wn.2d 543, 313 P.2d 676 (1957); *Roehl v. Public Utility Dist. No. 1*, 43 Wn. 2d 414, 261 P.2d 92 (1953); and *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750 (1896). This rule applies with equal force to constitutional questions. *Unemployment Compensation Dept. v. Hunt*, 17 Wn.2d 228, 135 P.2d 89 (1943).

This court has stated on many occasions that it will not undertake to review what the court below did not decide. See e.g., *Walters v. St. Louis*, 347 U.S. 231, 333; 74 S.Ct. 505; 98 L.ed. 660, 664 (1954). More particularly this court will not consider questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned, or because not noticed or relied upon in the briefs or argument of counsel. *Pennsylvania R. Co. v. Illonois Brick Co.*, 297 U.S. 447, 80 L.ed. 796 (1936); *Hulvert v. Chicago*, 202 U.S. 275, 50 L.ed. 1026 (1906); *McGoldrick v. Compagnie Gen. Transatlantique*, 309 U.S. 430, 84 L.ed. 849 (1940).

STATEMENT OF THE CASE

The admitted facts (Answer; R. 5) are that petitioner assessed a general personal property tax of $3,123.76 upon steel goods owned by respondent having an assessed value of $48,430.00. One half, $1,561.88, of the claimed tax, was paid under protest. Suit for refund of the tax followed alleging, among other grounds, that

imposition of the tax violates and is repugnant to Article I, Section 10, Clause 2 of the Constitution of the United States (Complaint 3; R.8). The Trial Court awarded summary judgment to respondent (R.2-4) refunding the entire amount of tax. That judgment was affirmed on appeal by the Supreme Court of the State of Washington (R. 12, 12(a)).

Respondent was engaged in the State of Washington exclusively in the business of importing from foreign countries steel goods such as steel pipe, barbed wire and cable. It engaged in no manufacturing or other business within the State of Washington, and it had never owned or sold any goods within that state which were not imported from foreign countries. All of the goods which it imported were imported exclusively for the purpose of sale, and were sold by it to purchasers in Washington and other states.

The particular goods upon which the tax here involved was assessed and paid, consistent with the above described practices, were imported directly from foreign countries and arrived at piers in Seattle, Washington by ocean carrier. These goods remained in their original bundles, reels, crates and packages in which they were received while temporarily stored awaiting shipment to respondent's vendees. Upon rspondent's sale of these goods they were shipped by common carriers to the vendees in the original bundles, reels crates and packages in which the goods were carried by the ocean carriers. Respondent did not, nor did any other person, perform any service or act whatsoever on or with respect to the goods after their arrival by ocean carrier and before their shipment after sale to respond-

ent's vendees, and none of the bundles, reels, crates or packages in which these goods arrived was opened prior to delivery to the common carriers for shipment to respondent's vendees (Complaint 1, 2, 3; R.6, 7; Answer; R.5, Judgment 1, 2; R.3).

ARGUMENT

A. There is No Substantial Federal Question

The Washington court decided the case in accord with the applicable decisions of this court in *Brown v. Maryland,* 12 Wheat 419, 6 L.ed. 678 (1827), *Low v. Austin,* 13 Wall 29, 20 L.ed: 517 (1871); *Youngstown Sheet & Tube Co. v. Bowers* and *U.S. Plywood Corp. v. Algoma,* 358 U.S. 534, 3 L.ed. 2d 490, 79 S.Ct. 383 (1958).

Low v. Austin is squarely in point. The question in *Low* as stated by Justice Field was:

> "... whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to state taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer," 20 L.ed. at 518.

Those goods when taxed, as were the goods here in issue, were stored in their original packages in a warehouse where they remained for sale by the importer. The tax involved, as was the tax here, was a general ad valorem property tax.

Low relied upon *Brown v. Maryland* as controlling. In his opinion in *Brown,* Chief Justice Marshall said:

> "... It is sufficient for the present to say generally, that when the importer has so acted upon the thing imported that it has become incorpo-

> rated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import and has become subject to the taxing power of the state; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." 12 Wheat at 441, 442, 6 L.ed. 686.

In the *Youngstown* and *U.S. Plywood* cases, this court held that goods imported by a manufacturer lose their distinctive character as imports when they are used to supply the day-to-day manufacturing requirements of the manufacturer-importer although they have not been sold or removed from their original packages. It was there decided that by such use the manufacturer-importer had so acted upon the goods as to terminate their immunity within the principle established in *Brown*.

While *Youngstown* and *U.S. Plywood* narrowed the rule announced in *Brown* and followed in *Low* as it applies to a manufacturer-importer, those cases reaffirmed this court's adherence to *Brown*. At 358 U.S. 545, 3 L.ed. 2d 498, this court, with reference to the Import-Export Clause, said:

> ". . . The constitutional design was then to immunize imports from taxation by the importing States, and all others through or into which they may pass, so long as they retain their distinctive character as imports. Hence, that design is not impinged by the taxation of materials that were imported for use in manufacturing after all phases of the importation definitely have ended and the

materials have been 'put to the use for which they (were) imported' . . ."

In the instant case, respondent was engaged in no manufacturing or other activities in Washington. Its goods, rather, were imported only to be sold, and at the time they were taxed they were temporarily stored at the piers and warehouse waiting shipment to plaintiff's vendees in Washington and other states. At the time the tax was imposed, the goods not only retained their distinctive character as imports, but they were still in the actual flow of commerce which had started on foreign soil and was not to end until delivery was effected by common carrier to respondent's customers. Respondent had done none of the things which *Brown* held must occur before tax immunity ends, nor had it acted upon the goods in any manner, much less in a way held sufficient in *Youngstown*, to permit the tax.

Petitioner then is requesting this court to overrule *Brown v. Maryland* and *Low v. Austin* and to reverse its affirmance of those cases so recently announced in *Youngstown* and *U.S. Plywood*.

B. Matters Outside the Record

On page 6 and in Appendix 4 of the petition, extensive factual matters are presented which are not only irrevelant but are completely outside the record. Furthermore, petitioner has not referred to any source for this material and has thereby rendered it virtually impossible for respondent to even comment intelligently on the material. Certainly this court in determining whether to grant certiorari should not consider matters which are both outside the record and anonymous.

Whatever may be petitioner's purpose for including this anonymous material, it cannot claim it has become accustomed to any of the projected revenue mentioned or that its tax sources will be reduced because of the Washington Supreme Court's decision, for petitioner, consistent with *Brown v. Maryland*, has never collected taxes from imported goods situated as these were.

It is also fair for respondent to mention, since petitioner has projected its figures on assessments said to have been computed on the average inventory method (Br. 6), that this very method (see Revised Code of Washington 84.40.020) permits petitioner to exact its tax from such of respondent's imports which may ultimately be purchased any time during the tax year by vendees located within petitioner's jurisdiction. On the other hand, as to imports which are purchased by and shipped to vendees located outside of King County (the petitioner here), such imports have indeed simply passed through King County as a port of importation on the way to their ultimate destination. The exact purpose of the Import-Export Clause is, of course, to prohibit just such a port from taxing goods which are passing through it.

Petitioner's "Third Question" (Br. 11) was not raised in any manner before the Trial Court, as mentioned above, and so cannot be considered here. Even if the rule were otherwise it is a sufficient answer to this question here that the same question was raised and argued to this Court in *Low v. Austin*, 13 Wall. 29, L.ed. 517 at 518.

CONCLUSION

Petitioner requests this Court to review a judgment which rejected an *ad valorem* tax imposed on imported goods while they remained unopened before sale and while they had yet to be shipped to their purchasers. The taxpayer (respondent) engaged in no business other than importation of goods and it performed no act whatsoever with respect to the goods which, when they were ultimately sold, were not sold from the shelf or from displays but were shipped by common carrier to the purchasers both within and without the State of Washington.

The decision of the Court below, then, is in complete harmony with the applicable decisions of this Court, and the petition should therefore be denied.

Respectfully submitted,

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